Supreme Court, U.S.
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No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari
To The Montana Supreme Court

REPLY BRIEF FOR PETITIONER

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The respondent's brief fails to address the controlling considerations presented by the petitioner and the amici curiae. Foremost among the omissions is a discussion of the underlying purposes of the Fifth Amendment privilege and its application to convicted defendants who, through a suspended prison sentence, have been extended the benefit of therapy in a community-based setting. While the respondent's brief specifically reviews the issue of whether Imlay has a vestigial Fifth Amendment right in postconviction proceedings, it fails to mention the fact that his statements were solicited solely for therapy purposes. It further fails to address an issue which the Montana Supreme Court considered crucial to its decision: whether revocation of Imlay's probation was a penalty imposed for the valid exercise of the privilege. The respondent's brief thus serves only to emphasize the irony of the situation created by the Montana Supreme Court's decision, in which a convicted defendant is placed in the awkward position of arguing that the Fifth Amendment privilege mandates incarceration rather than probation and meaningful treatment.

Respondent addresses only two narrow and highly speculative considerations: the possibility of newly discovered evidence and the threat of perjury. Neither the remote prospect of newly discovered evidence nor the unrealistic threat of a future perjury prosecution warrants the extension of the Fifth Amendment privilege against self-incrimination to statements made in therapy that concern only the crime for which a defendant has been convicted. The Fifth Amendment privilege does not protect speculative prospective acts. *United States v.*

Apfelbaum, 445 U.S. 115, 129 (1980). The privilege serves to protect against future incrimination that is "real and appreciable." *Brown v. Walker*, 161 U.S. 591, 600 (1896). The prospect of newly discovered evidence is much too speculative to form the basis for Fifth Amendment protections. The threat of perjury is equally chimerical because, under Montana law, statements made in therapy may not be used as the basis for a future criminal prosecution. *State v. Thiel*, 768 P.2d 343 (Mont. 1989).

The respondent's brief continues a fiction created by the Montana Supreme Court that Imlay denied the crime because he did not want to impair any postconviction relief or out of fear of a perjury prosecution. There is no indication in the record that his denial was based upon Fifth Amendment concerns or the fear of future repercussions if he admitted his guilt in therapy. The arguments in the respondent's brief concerning newly discovered evidence and the threat of perjury are therefore illusory and misleading.

ARGUMENT

I. THE POSSIBILITY OF NEWLY DISCOVERED EVIDENCE IS TOO REMOTE AND SPECULATIVE TO WARRANT APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Respondent states that he is waiting for the victim to recant and that for this reason the Fifth Amendment protects any statements he might make in therapy concerning the crime for which he has already been convicted and sentenced. There is no basis whatsoever to

support respondent's anticipation of newly discovered evidence. The protections afforded by the privilege against self-incrimination do not extend to such wishful conjecture and speculation.

The remote possibility of a recantation based upon wishful thinking cannot serve to hinder the criminal justice process or to trigger Fifth Amendment protections. *United States v. Apfelbaum, supra* (prospective acts will ordinarily involve only speculative and insubstantial risks of incrimination).[1] In *Chaffin v. Stynchcombe*, 412 U.S. 17, 34-35 (1973), the Court noted that speculative prospects of a harsher sentence after successful appeal do not create a realistic threat to the free choice of whether to pursue the appeal. Equally important, the theoretical possibility of newly discovered evidence does not create a constitutionally coercive threat here, since the respondent retained the freedom to decide whether to participate in postconviction therapy.

Respondent's conviction is deemed final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). It is contrary to the concept of finality to preclude the State from proceeding with appropriate treatment because, at some indeterminate point, a defendant may want to collaterally attack his conviction. The concept of finality demands that once

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[1] Even if the victim recanted, whether the recantation could be the basis for postconviction relief is in itself highly speculative. In *State v. Perry*, 759 P.2d 268, 274-75 (Mont. 1988), the Montana Supreme Court rejected recantation testimony as the basis for postconviction relief, noting the limited value of such testimony and how it is traditionally viewed with great suspicion.

a conviction is final, the State may proceed with the therapy and rehabilitation appropriate for an individual defendant.[2] As Justice Harlan stated in discussing the importance of finality of criminal litigation:

> Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring), quoted with approval in *Teague v. Lane*, 489 U.S. 288, 309 (1989). A defendant must not be sentenced tentatively. It is for the defendant's benefit, as well as the State's, to begin meaningful rehabilitative efforts as soon as possible.

Respondent suggests that under Mont. R. Civ. P. 60(b), his conviction could be set aside on the basis of newly discovered evidence. Resp. Br. at 8. Rule 60(b) would provide no relief to respondent. Any postconviction relief must be based upon Mont. Code Ann.

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[2] As indicated in the petitioner's opening brief, the only instances in which states have given a sympathetic ear to an allegation of viable Fifth Amendment rights in a postconviction setting is where appeal as of right is still pending or available. *See* Pet. Br. at 18, n.18. Respondent has never appealed his conviction and is time-barred from doing so.

§§ 46-21-101 to -203 (1991), the state postconviction statutes. As discussed in petitioner's opening brief, the privilege against self-incrimination with respect to the crime for which a defendant has already been convicted has little, if any, viability in the postconviction arena.[3] *See* Pet. Br. at 16-20.

II. THERE IS NO REALISTIC THREAT OF A PERJURY PROSECUTION.

Imlay has never asserted, and the record does not reflect, that his denial of the crime in therapy was motivated by his fear of a perjury prosecution. The threat of a perjury prosecution is a misleading fiction, unsupported by the record, that arose from the Montana Supreme Court's reliance upon the case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, the sentencing court threatened the defendant with a longer sentence unless he confessed to the court that he was guilty of the crime of which he had been convicted. Imlay's situation was much different from that of a defendant standing in open court. Imlay's statements were requested in a treatment setting, and were required solely for therapy and

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[3] Even if Rule 60(b) were applicable generally to a criminal postconviction proceeding, any newly discovered evidence, at this point, would be time-barred. Rule 60(b) provides that a motion based upon newly discovered evidence must be made not more than 60 days after notice of entry of judgment. Further, the prospect of newly discovered evidence does not serve to suspend imposition of appropriate treatment for a convicted defendant. Rule 60(b) provides: "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

rehabilitation purposes. Imlay was not placed inquisitorially before a sentencing judge and told to confess or else go to prison.

The sentencing court suspended Imlay's prison sentence through an act of leniency by the sentencing court, in the hope that he would be amenable to therapy and take meaningful steps toward rehabilitation. Thus, the discussion of the Fifth Amendment privilege in *Allen v. Illinois*, 478 U.S. 364 (1986), is most pertinent. *See* Pet. Br. at 15-16.

Moreover, under Montana law, statements made in therapy may not be used in any future criminal prosecution where the charges are based upon the statements themselves. *State v. Thiel, supra*. Because Imlay's statements concerning the crime for which he had already been convicted could not be used as proof of perjury, he was never under a realistic threat of future criminal prosecution for the crime. *See also* Pet. Br. at 21, n.16.

In *Brown v. Walker, supra*, the Court enunciated the controlling standard for application of the Fifth Amendment privilege against self-incrimination. The danger against which the privilege provides a shield must be

> real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

Id. See also Hoffman v. United States, 341 U.S. 479, 486-87 (1951) ("To sustain the privilege [against self- incrimination], it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result"). The Fifth Amendment privilege is confined to instances where an individual has reasonable cause to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917). Not only is there no indication in the record that the threat of perjury influenced Imlay's conduct in denying the crime during therapy, but, under *Thiel*, the State could not prosecute him for perjury for any statements made in the course of therapy. A reasonable person would not have seen perjury as a threat in this setting. Thus, the threat of perjury is wholly unrealistic and insubstantial.

Even absent the holding in *Thiel*, the idea that the State would prosecute Imlay for complying with a probationary condition and successfully taking the first step toward rehabilitation is irrational. The State's interest, here, lies in furthering a defendant's rehabilitation and his reintegration into the community, without placing the community at risk. This is the interest that was pursued in the original sentencing when the condition requiring sex offender treatment was initially imposed. To use the threat of perjury to preclude a possible benefit to a defendant is illogical and certainly not an intended result of the Fifth Amendment privilege. *See United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989) (the possibility of leniency cannot be equated with impermissible punishment).

Imlay has raised nothing in his response brief to indicate that a real and substantial threat to his privilege against self-incrimination exists in this case. Neither the speculation of newly discovered evidence nor the unrealistic threat of perjury justifies application of the Fifth Amendment protections to Imlay's denial of the sexual assault in postconviction therapy.

The Fifth Amendment privilege against self-incrimination, despite its grave importance, applies to only a narrow scope of inquiries. *Garner v. United States*, 424 U.S. 648, 655 (1976). It does not apply when the government seeks answers to questions in a noncriminal investigation. *Id.*, citing *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). It does not apply when the government seeks a response for purely rehabilitative purposes. *Allen v. Illinois, supra.* It does not apply when the response would not realistically expose a probationer to future criminal prosecution. *Minnesota v. Murphy*, 465 U.S. 420, 426, 435 n.7 (1984). It therefore cannot apply to a probationary condition in which statements are sought for noncriminal, therapeutic purposes, and where the statements could not realistically be used in a future criminal prosecution.

Imlay had no initial right to his conditional liberty. Mont. Code Ann. § 46-18-201. He was not "forced" in any way to accept probation. Probation was granted as a form of leniency, in the hope that Imlay would be reintegrated into society, without placing society at risk.[4] Sex offender

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[4] In his brief, respondent claims that the sentencing court was aware that Imlay's denial would make him unsuitable for

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treatment was designed to promote such rehabilitation and reintegration. Once outpatient therapy failed, the sentencing court's duty was to reevaluate Imlay's rehabilitation potential, as well as his potential risk to society, and redetermine his probationary status. When Imlay's continued denial showed that he could not take the first step toward meaningful rehabilitation, the State's supervision changed to accommodate both Imlay's need for inpatient therapy and the desire to protect society. There was therefore no "penalty" for Imlay's denial of the

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treatment when the condition requiring sex offender treatment was initially imposed. Contrary to this assertion, the record shows that the sentencing court was not aware at the time the condition was initially imposed that Imlay would not be amenable to treatment. *See* Judgment of Conviction and Re-Sentencing in which the sentencing court states, "Had the Court known at the time of the original sentence herein that this defendant would not be accepted in a sexual offender treatment program, the Court would not have imposed a suspended sentence but rather would have imposed a prison sentence." (J.A. 41.)

Also contrary to respondent's assertions, the presentence report does not indicate that Imlay's denial would preclude him from treatment. The probation officer acknowledged that denial of the offense indicates Imlay's possible danger to the community because of the possibility of reoffending. (Presentence Report, NR #57 at 6.) Because of Imlay's denial, the probation officer recommended incarceration and enrollment in the sex offender treatment program at the Montana State Prison. Nonetheless, the probation officer recommended that, in the event the court chose to suspend Imlay's sentence, Imlay undergo a sex therapy program in the community. *Id.*

crime.[5] Imlay was incarcerated not for invocation of his Fifth Amendment rights, but because he had been found guilty of sexually assaulting a seven-year-old girl and was unamenable to treatment.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

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[5] The Montana Supreme Court reasoned that Imlay's Fifth Amendment right was infringed because he suffered the "penalty" of incarceration when his probation was revoked. Pet. App. 14a. As discussed in petitioner's opening brief, revocation of probation for failure to comply with a probationary condition is not a "penalty" that triggers Fifth Amendment protections. Pet. Br. at 23-32.